No. 91-1480

In The
Supreme Court of the United States
October Term, 1991

Supreme Court, U.S.
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CITY OF PONCA CITY, a
Municipal Corporation,
Petitioner,

v.

HOUSING AUTHORITY OF THE KAW
TRIBE OF INDIANS OF OKLAHOMA,
Respondent.

Petition For A Writ of Certiorari To The
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether an Indian housing authority, which is created by state law and is an agency of a state, is a "person", and therefore an "aggrieved person", as defined under Section 802 of the Fair Housing Act (42 U.S.C. §3602), who may institute suit against a different political subdivision of the same state under Section 813 of the Fair Housing Act (42 U.S.C. §3613).

2. Whether a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered where (a) the issues raised in the subsequent federal court litigation could have been, but were not, raised by the federal court plaintiff in the previous state court litigation involving the identical parties, and (b) where the federal court defendant was the plaintiff and the federal court plaintiff was the defendant in the previous state court litigation.

3. Whether a defendant which had successfully sought a motion to dismiss pursuant to Fed. R. Civ. P. 12

(b)(6) must file a cross-appeal in order to assert as a basis for supporting the order dismissing the case a basis which the district court had rejected.

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Petition For A Writ of Certiorari To The
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PETITION FOR WRIT OF CERTIORARI

Petitioner, The City of Ponca City, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit, entered in this proceeding on December 19, 1991, as authorized by Rule 13 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

On December 19, 1991, the United States Court of Appeals for the Tenth Circuit rendered its opinion on the appeal from the United States District Court for the Western District of Oklahoma, affirming in part and reversing in part the judgment of the district court. The December 19 opinion, which is to be reported as *Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991), is included in petitioner's appendix at page 1. On September 22, 1989, the United States District Court for the Western District of Oklahoma granted petitioner's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). That judgment is included in petitioner's appendix at page 56. The transcript of the September 22, 1989, hearing is included in petitioner's appendix at page 62. On March 9, 1990, the United States District Court for the Western District of Oklahoma denied respondent's (plaintiff's) motion to reconsider dismissal of its complaint. That

order is included in petitioner's appendix at page 59. The complaint is in petitioner's appendix at page 44.

JURISDICTION

On December 19, 1991, the United States Court of Appeals for the Tenth Circuit entered the judgment sought to be reviewed. The statutory provisions believed to confer on this Court's jurisdiction to review the judgment in question are 28 U.S.C. §§ 1254(1) and 2101(c). This petition for certiorari is filed within 90 days after the entry of judgment by the Tenth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. §1738

State and Territorial statutes and judicial proceedings; full faith and credit

Such * * * judicial proceedings * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. §3602(d)

"Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 of the United States Code, receivers and fiduciaries.

42 U.S.C. 3602(i)

"Aggrieved person" includes any person who-
(1) claims to have been injured by a discriminatory housing practice; or
(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. §3613(a)(1)(A) **Enforcement by private persons**

(a) **Civil action.**

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. §2000e(a). **Definitions**

For the purposes of this title -

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, United States Code or receivers.

STATEMENT OF THE CASE

Respondent, Housing Authority of the Kaw Tribe of Oklahoma ("Kaw Housing Authority"), is an Oklahoma state agency organized under the provisions of Okla. Stat. tit. 63, §§ 1051 *et seq*. In its complaint (*see* appendix at page 44) filed in the United States District Court for the Western District of Oklahoma on April 21, 1989, Kaw Housing Authority sought relief from the City of Ponca City, an Oklahoma municipal corporation, under 42 U.S.C. §§ 1981, 1982 and 1983, and under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. §

3613 (*see* appendix at page 45, ¶ 4).

The basis of the complaint is that Ponca City allegedly discriminated against Kaw Housing Authority for racial reasons by refusing to approve an agreement to allow Kaw Housing Authority to purchase homes within the corporate limits of Ponca City. Although Ponca City did not itself own the homes, the State of Oklahoma requires Kaw Housing Authority to seek Ponca City's permission before operating within the boundaries of the municipality. The city council of Ponca City voted to approve the agreement. The mayor vetoed the resolution, however, and the council upheld the veto. (*See* appendix at pages 46-49).

The complaint in this case alleges that shortly after Ponca City declined to approve the agreement, according to the complaint, Ponca City filed a lawsuit in state court against Kaw Housing Authority, seeking an injunction barring Kaw Housing Authority from purchasing or owning homes within the corporate limits of Ponca City without first having the city's permission. The complaint then

alleges that the state court judge issued the requested permanent injunction.[1] (*See* appendix at pages 48-49).

Ponca City, the petitioner, responded to the complaint in this case by filing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that Kaw Housing Authority, as a political subdivision of the State of Oklahoma, has no federal constitutional rights which it can enforce against another political subdivision of Oklahoma under the Civil Rights Acts of 1866 and 1871, and, therefore, is an improper party plaintiff under Sections 1981, 1982 and 1983. The motion also sought dismissal because Kaw Housing Authority does not qualify as an "aggrieved person" who can maintain an action

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[1] According to documents submitted to the federal trial court in this case by both parties in response to petitioner's Rule 12(b)(6) motion to dismiss, Kaw Housing Authority had responded to the state court lawsuit by filing a combined motion for summary judgment and motion to dismiss. At the hearing on the motions, the state court judge granted summary judgment against Kaw Housing Authority, and thereby entered the requested permanent injunction. Several weeks later, Kaw Housing Authority instituted this action.

against Ponca City under Section 3613 of the Fair Housing Act. Finally, the motion to dismiss asserted that Kaw Housing Authority was barred by the doctrine of *res judicata* from asserting these claims.

The trial court denied the motion to dismiss based upon the doctrine of *res judicata*. But the trial court granted the motion to dismiss based upon the first two propositions. The trial court also denied Kaw Housing Authority's subsequently filed motion for a new trial. (*See* appendix at page 56).

After granting Ponca City's motion to dismiss, the trial court denied Kaw Housing Authority's timely filed motion for reconsideration. Kaw Housing Authority subsequently filed its notice of appeal to the United States Court of Appeals for the Tenth Circuit. The City of Ponca City filed no cross-appeal. On December 19, 1991, the Tenth Circuit affirmed the trial court's decision dismissing the claims under Sections 1981, 1982 and 1983, but reversed the trial court's decision dismissing the claim under the Fair Housing Act. The Tenth Circuit also held

that the doctrine of *res judicata* does not apply in this case, either because there was insufficient evidence that Kaw Housing Authority had a full and fair opportunity to litigate its claims in the previous state court litigation, or because the City of Ponca City had not filed a cross-appeal of the district court's ruling granting its motion to dismiss.

ARGUMENTS

SYNOPSIS

The decision below, if left unreviewed, will drastically alter concepts of federalism, comity and separation of powers. Additionally, it will work a significant revision of the rules of litigation.

The impact on the federal system is two-fold: 1. The opinion withdraws from states the right to regulate the relative powers of their political subdivisions; and 2. The opinion withdraws from state court judgments the finality which is the keystone of the federal judicial system. Worse, the appellate court accomplishes this by

ignoring the dictates of this Court -- it substitutes its notions of claims preclusion for those of the Federal Full Faith and Credit Act and state law.

The court of appeals' opinion also amounts to a judicial endorsement of the practice of altering the statutory scheme adopted by Congress, and substituting for the legislation the result that the court prefers. Furthermore, the Tenth Circuit order alters the rules of litigation, by requiring a defendant, who was absolutely successful in obtaining complete dismissal of all counts, to appeal that decision in order to preserve alternative bases for supporting the dismissal order. This petition demonstrates the reasons that the Court should grant certiorari to review the order of the court below.

POINT I:

Allowing a governmental entity such as Kaw Housing Authority to proceed under the Fair Housing Act amounts to an improper judicial expansion of the statutory scheme of the Fair Housing Act.

In *Gladstone, Realtors v. Village of Bellwood*, 441

U.S. 91 (1979), this Court invited a petitioner for certiorari to properly raise the question whether a governmental entity is a "person" or a "private person" under the Fair Housing Act. The Court specifically stated in *Gladstone* that that question was "not properly before us, and we express no views on it." 441 U.S. at 109 n. 21. *Gladstone* concerned standing under the Fair Housing Act. This case concerns the question whether the plaintiff, Kaw Housing Authority, "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court...." *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979). In contrast to *Gladstone*, this case properly raises those issues as a matter of law, and presents the reasons that a governmental agency, such as Kaw Housing Authority, is neither a "person", nor a "private person", nor even an "aggrieved person".

Because the complaint specifically states that it is an attempt to maintain an action under 42 U.S.C. §§ 3602, 3604 and 3613, Kaw Housing Authority must be

one of the class of persons who is entitled to maintain a civil action under those statutes. *See* appendix at page 44. Section 3613 allows a private person to maintain a civil action if that person is an "aggrieved person". According to Section 3602, the definitions section of the Fair Housing Act, an "aggrieved person" is any "person" who claims to have been injured by an impending discriminatory housing practice or believes he will be injured by such a practice. According to Section 3602(d):

> "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual company, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries.

It is instructive to compare this definition, enacted as section 802(d) of the Civil Rights Act of 1968, with Title VII of the Civil Rights Act of 1964. Under the 1964 Act:

> The term 'person' includes one

> or more individual, **governments, governmental agencies, political subdivisions,** labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 or receivers.

42 U.S.C. §2000e(a) (emphasis added). As the comparison makes plain, Sections 2000e(a) and 3602(d) are virtually identical, with the exception that the Fair Housing Act omits the words, "governments, governmental agencies, political subdivisions," from its definition of the term "person".

Instead of focusing on whether Congress authorized a state agency to bring a Fair Housing Act claim in this case, the court below simply looked to determine why Congress might not have authorized such a claim. This puts the cart before the horse. Either Congress did, or it did not, empower Kaw Housing Authority to sue Ponca City under the Fair Housing Act.

Furthermore, the Tenth Circuit misconstrued the issue before it as if it were a question of standing. Indeed, "[t]he Court of Appeals appeared to confuse the question of whether [respondent] had standing with the question of whether [it] had asserted a proper cause of action." *Davis v. Passman*, 442 U.S. at 239 n.18. The point was not whether such and such a person had standing to sue. Instead, the question was whether a certain type of entity is a "person" at all. The issue is one of *cause of action*, not standing. 442 U.S. at 239 n. 18.

The court below betrays the basis of its opinion in the conclusion to its footnote 16 when it says that "we are satisfied that Congress intended the result we reach here." Yet, the question is not what Congress intended, but what Congress did. And, according to virtually every traditional rule of statutory construction, Congress did not include Kaw Housing Authority as a "person" under the Act.

What the Tenth Circuit has done is to apply its own concept of the broad purposes that it believes Congress

should have had in mind in adopting the Fair Housing Act, as opposed to looking at precisely what Congress actually enacted. This method of reasoning is improper. *Cf. Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986); *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 672 (1988). As the Court has stated, it is inappropriate for the judiciary to prescribe a different class of beneficiaries of a statutory scheme than Congress has specifically enacted. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-626 (1978). *See also Karahlios v. National Federation of Federal Employees*, 489 U.S. 527, 532-533 (1989); *Middlesex Cty. Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). "[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 626.

Almost one hundred years ago, one of the greatest legal minds in American history wrote, "We do not inquire what the legislature meant; we ask only what the statute

means." O. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). Here, by contrast, the Court of Appeals simply determined what it thinks the proper outcome should be, and substituted that for what Congress actually enacted. Congress stated that particular "persons" have power to enforce the provisions of the Fair Housing Act. It is those persons, and only those persons, who may bring lawsuits under Section 3613.

Under the time-honored doctrines of 1. *expressio unius est exclusio alterius*, *cf. Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989), 2. the construction together of statutes governing the same subject matter, *cf. Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-788 (1976); *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39 (1939), and 3. even the basic assumption that states have authority to regulate their own territory and that a clear statement is required before a judge will find federal preemption of state law,

see, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 500 (1988); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) - under all of these doctrines, only one result is appropriate. The Fair Housing Act did not empower one political subdivision of a state to sue a sister political subdivision.

Interestingly, this is not a case where the legislative history, or even the administrative interpretation is particularly enlightening. Reading, for example, that the use of the term, "aggrieved person", in Section 3602 is meant "to reaffirm the broad holdings of [*Bellwood* and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982),]" - elucidates the issue of standing, *cf. Davis v. Passman*, 442 U.S. at 239 n. 18 (*Bellwood* concerned standing, not *cause of action*), but does not elucidate who is included within the scope of the term, 'person'. *See* H. R. Rep. No. 711, 100th Cong., 2nd Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2184. That issue, until today, has not been before the Court, and was not in those two cases.

Likewise, this is not a case where the plain text of the statute results in an absurdity. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-511 (1989). To the contrary, the plain language makes sense. This lawsuit really concerns the relative powers of sister political subdivisions of the same state. That is an issue traditionally relegated to state law. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Tenth Circuit's interpretation of the Fair Housing Act, however, results in a serious breach of notions of federalism, by allowing sister political subdivisions of the same state to challenge each other's state law statutory authority. Such a result should not be implied without a clear statement that Congress intends precisely that result. *Isla Petroleum Corp.*, 485 U.S. at 500. This is a case where the plain language of the statute, especially when compared to the text of Section 2000e(a), dictates the conclusion that Kaw Housing Authority cannot sue Ponca City under the Fair Housing Act.

The question in this case is not what a court thinks Congress should have done. Congress, not the courts, has the exclusive power "to formulate legislative policies and mandate programs and projects [and] establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978). "[W]hatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Jett v. Dallas Ind. School Dist.*, 491 U.S. at 732. "[C]ourts should not expand the coverage of the statute to subsume other remedies...." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). The question in this case is not what Congress should have done, but what Congress did.

The Fair Housing Amendments Act of 1988 replaced former Section 3612 with current Section 3613. The new provision allows for enforcement by an "aggrieved person", in contrast to the old law, which had

used the broad term, "plaintiff". Indeed, the new statute uses the active voice - "[a]n aggrieved person may commence a civil action ..." - whereas the repealed provision used the all-inclusive, passive voice ("the rights granted by §§ 3603, 3604, 3605, and 3606 of this Title may be enforced by civil actions ...."). Thus, the new provision, in contrast to the old, precisely provides who may employ it - an "aggrieved person". But, a governmental agency, like Kaw Housing Authority, is not a "person", and therefore cannot be an "aggrieved person".

Standing under Section 3613 may be as broad as that afforded by Article III. Indeed, the legislative history of the 1988 amendments so indicates. *See* H. R. Rep. No. 711, 100th Cong., 2nd Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2184. Although *Gladstone,* and *Havens Realty,* clarified the issue of standing under the Fair Housing Act, these cases never examined the scope of the term "person" insofar as a governmental entity is concerned. That is, they never

reviewed the issue of *cause of action* under the Fair Housing Act. *Cf. Davis v. Passman*, 442 U.S. at 239 n. 18. Indeed, in *Bellwood*, this Court specifically stated that it did not consider the issue whether the village was a "person" or a "private person" under the Fair Housing Act. *Bellwood*, 441 U.S. at 109 n. 21. By contrast, this case squarely and properly presents the issue.

Whether a governmental entity is a "person" under the Fair Housing Act is an important question of federal law which has not been, but should be, settled by this Court. If the words defining the term "person" in the Civil Rights Act of 1964 and the Civil Rights Act of 1968 are to have any meaning at all, they cannot be identical. The use of the terms "governments, governmental agencies, political subdivisions," in Title VII of the 1964 Act cannot possibly have the same significance as has their exclusion from Title VIII of the 1968 Act.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court, per Justice Brennan, unanimously endorsed the practice of construing together civil rights

statutes which in relevant part are "virtually *in haec verba*...." 441 U.S. at 755. Because the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*., and, as here, Title VII of the Civil Rights Act of 1964, used similar words and had similar purposes, they should be construed *pari materia*. *See also Northcross v. Board of Educ. of the Memphis City Schools*, 412 U.S. 427, 428 (1973) (Emergency School Aid Act of 1972 and Civil Rights Act of 1964 construed "*pari passu*").

Likewise, Sections 2000e(a) and 3602(d) should be construed *pari materia*. Because the one statute adds "government, governmental agencies, political subdivisions," to its definition of the term, "person", and the other does not, the latter must not include those entities when it refers to a "person".

Congress could have defined "person" as one or more individuals or entities of any type. Or it could have chosen to define the term in any number of broad ways. But it did not do so. Instead, Congress purposely used

the words, "governments, governmental agencies, political subdivisions," in one civil rights statute but did not do so in the other civil rights statute. Allowing a court to substitute its unsubstantiated notions of Congressional intent for the plain meaning of Congressional acts is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

POINT II:

Failure to accord full faith and credit to a prior state court judicial proceeding is a serious departure from the accepted and usual course of judicial proceedings and conflicts with the decisions of other federal courts of appeals and this Court.

According to 28 U.S.C. § 1738:

> [T]he records and judicial proceedings of any such State ... shall have the same full faith and credit in every court within the United States....

This means that a "federal court must give to a state-

court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). As this court has clarified in the context of a Title VII claim, "the comity and federalism interests embodied in § 1738 are not compromised by the application of *res judicata* and collateral estoppel..." in this type of civil rights litigation. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982).

In case after case over the past decade, this Court has repeatedly held that it was fundamental error for a court of appeals to refuse to consider the possible preclusive effect under state law of a prior, state-court judgment. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 375, 380, 384 (1985); *Migra,* 465 U.S. at 81; *Haring v. Prosise*, 462 U.S. 306 (1983); *Kremer,* 456 U.S. at 485; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). In this case, however,

the Tenth Circuit completely ignored the clearly expressed law as enunciated by this Court and as practiced by every other circuit court of appeals[2] in this country. In so doing, the Tenth Circuit has made a "fundamental departure from traditional rules of preclusion." *Kremer*, 456 U.S. at 485.

The provisions of the Federal Full Faith and Credit Act generally require that a court "consider first the law of the State in which the judgment was rendered to determine its preclusive effect." *Marrese*, 470 U.S. at 375. Furthermore, Section 1738 specifically commands that federal courts may not employ their own rules of *res judicata* to determine the effect of a state court judgment, but instead must accept the rules chosen by the State from which the judgment is taken. 470 U.S. at 380 (quoting *Kremer*, 456 U.S. at 481-482). This Court has repeatedly instructed the courts of appeals not to attempt

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[2] *See generally* cases collected in Wright, Miller & Cooper, *Federal Practice & Procedure* § 4471 n. 7 (Supp. 1991). *See also Concordia v. Bendekovic*, 693 F.2d 1073, 1077-1078 n. 6 (11th Cir. 1982).

to "determine the preclusive effect of a state court judgment without regard to the law of the State in which judgment was rendered." *Marrese*, 470 U.S. at 380; *see also Parsons Steel*, 474 U.S. at 525; *Kremer*, 456 U.S. at 466.

Instead of following the mandate of Section 1738, the Tenth Circuit absolutely ignored state law. The court made no reference to state law. It cited no Oklahoma cases.

The Tenth Circuit simply made the unsubstantiated statement that "the record does not reflect sufficient evidence that the Authority was given a full and fair opportunity to litigate [the Fair Housing Act] claim before the state court...." Yet, a reading of the complaint, and of every other document of record in this case, does not give even a hint that Kaw Housing Authority received anything but a full and fair opportunity to litigate before the state court. To the contrary, the entire record affirmatively shows that Kaw Housing Authority in fact received all the process that was its due in the Kay

County District Court. Indeed, although the court below cited *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979), for the proposition that there was reason to doubt the fairness of the procedures followed in the prior state court litigation, it neither gave any substantiation for that statement nor paid any credence to this Court's statements in *Kremer* clarifying the meaning of that cited footnote.

This Court has stated:

> [W]here we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer, 456 U.S. at 481, 482. The Court further elaborated, stating that "what a full and fair opportunity to litigate entails is the procedural requirements of due process." 456 U.S. at 482 n. 24.

Stated simply, the Tenth Circuit did precisely what Section 1738 prohibits -- it substituted its own concept of *res judicata* for that of Oklahoma. This step it may not take. As one authority has written concerning another Tenth Circuit claims preclusion holding upon which the court below relied, "[t]he opinion seems a thinly veiled expression of dissatisfaction with the general rules announced by the Supreme Court." Wright, Miller & Cooper, *Federal Practice & Procedure* § 4471 n. 27.10 (referring to the holding in *Scroggins v. Kansas*, 802 F.2d 1289 (10th Cir. 1986)).

The complaint alleges that Ponca City sued Kaw Housing Authority in state court, seeking to permanently enjoin it from operating within the Ponca City city limits without Ponca City's permission. The complaint then alleges that the state court granted judgment in favor of

Ponca City, and thereby issued the requested permanent injunction. *See* appendix at page 44. Although the complaint does not so state, Kaw Housing Authority asserts that the state court judgment was somehow irregular, presumably because of the procedures, allowed by Rule 13, Rules for District Courts of Oklahoma, Okla. Stat. tit. 12, Ch. 2, App., that a state district court may grant summary judgment to the non-moving party. That is the only factor about the prior state court proceedings which might seem at all odd to a federal court.[3] Yet, the

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[3] In fact, it is difficult to tell whether the district court or the Tenth Circuit considered the voluminous record that Kaw Housing Authority and Ponca City submitted for consideration. Neither Judge Russell of the Western District of Oklahoma nor the Tenth Circuit indicated that the document had been excluded. *Cf.* Rule 12(b), Fed. R. Civ. Proc. (last sentence). Both the transcript of the district court proceedings and the Tenth Circuit opinion itself make it seem as if the courts did not exclude those additions to the complaint. On the other hand, both courts specifically considered the motion as one to dismiss. In any event, with or without the supplemental material, there is nothing in the record to suggest anything but that Kaw Housing Authority had a full and fair opportunity to litigate in Kay County District Court.

Oklahoma rules specifically make that procedure available, to all litigants, in all state court civil proceedings.

This Court has stated that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer*, 456 U.S. at 483. Surely, when all parties have notice, through published rules, that a court has power to decide a motion for either party, the procedures comport with the Due Process Clause of the Fourteenth Amendment.

Inescapable is the conclusion that Oklahoma's "panoply of procedures, complemented by ... judicial review, is sufficient under the Due Process Clause." *Kremer*, 456 U.S. at 484. The fact that Kaw Housing Authority failed to avail itself of all of the procedures state law allows may demonstrate that Kaw Housing Authority made an unwise tactical decision; but it does not constitute a sign of the inadequacy of Oklahoma's procedures. 456 U.S. at 485.

A brief review of Oklahoma law demonstrates that

the Oklahoma state court judgment is entitled to preclusive effect in Oklahoma. *See Citizens State Bank of Hugo v. Hall*, 413 P.2d 513 (Okla. 1966) (prior judgment on the merits precludes relitigation of the same underlying claims, including all matters germane to issues which could or might have been litigated); *Kelley v. Kelley*, 447 P.2d 774 (Okla. 1968) (*res judicata* applies where facts determined in former case are the essential facts of subsequent action); *Banks v. City of Ardmore*, 188 Okla. 611, 112 P.2d 372 (1941) (*res judicata* applies against claims which could have been brought as counterclaims); *Aetna Insurance Co. v. Ralls*, 200 Okla. 32, 190 P.2d 787 (1948) (status as plaintiff or defendant in prior action does not preclude application of *res judicata*). The permanent injunction Kaw Housing Authority refers to in its own complaint is itself a final judgment. Okla. Stat. tit. 12, § 1381 (1981); *Morse v. Earnest, Inc.*, 547 P.2d 955 (Okla. 1976).

Kaw Housing Authority itself chose to file a motion for summary judgment and to dismiss, instead of filing a

counterclaim in the state court proceeding. *Cf.* Okla. Stat. tit. 12, § 2013 (counterclaims procedure). Kaw Housing Authority itself chose to take the risks attendant with filing a motion for summary judgment in Oklahoma, that the court had the power to render judgment even to the non-moving party. *See* Rule 13(e), Rules for District Courts of Oklahoma. Okla. Stat. tit. 12, Ch. 2, App.

A cursory comparison of the state court litigation and this case likewise demonstrates that, indeed, the cases involved precisely the same issue. The issue in both cases concerned the power of Kaw Housing Authority to operate within the city limits of Ponca City without the city's permission. If Kaw Housing Authority did not need Ponca City's permission, then there is no Article III actual case or controversy. Kaw Housing Authority could do what it says it wants to do, at any time. If, on the other hand, state law requires Kaw Housing Authority to obtain Ponca City's permission, as the complaint itself alleges, *see* appendix at pages 45-49, and as state law provides, then, quite clearly, *res judicata*

attaches. For that is precisely what the Kay County District Court judgment held.

The Tenth Circuit's order actually is a double barrelled attack on the powers of the State of Oklahoma within the American federal system. This Court has stated that "[d]epriving state judgments of finality ... would violate basic tenets of comity and federalism." *Kremer*, 456 U.S. at 478; *Maresse*, 470 U.S. at 380. Not only does the Tenth Circuit's judgment attack the credibility of an Oklahoma state court judgment, but it also adversely affects interests of federalism by calling into question the very statutory method by which Oklahoma called into being two of its own political subdivisions, the Kaw Housing Authority and the City of Ponca City.

As the state court judge ordered, Kaw Housing Authority must obtain Ponca City's permission in order to operate within Ponca City. Because Ponca City had not granted that permission, the judge enjoined Kaw Housing Authority from operating within the city limits. That order

reflects not only the considered judgment of a sitting state court judge, but also the very law of Oklahoma which created Kaw Housing Authority, Okla. Stat. tit. 63, §§ 1054, 1057, as Kaw Housing Authority itself specifically pleaded in its complaint. *See* appendix at pages 45-49. Certainly, this is an instance where "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.'" *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 549 (1985) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)). Certainly, a state retains the right to regulate the relative powers of its various agencies and political subdivisions that it creates.

One commentator has described the process that a court is supposed to follow when determining the *res judicata* effect of a previous state court judgment.

> When a state court judgment is offered to establish preclusion in a federal 'civil rights' action, it is entitled to the res judicata effects described by state law. ***Section 1738 permits denial of res judicata for lack of a full***

> *and fair opportunity to litigate only if the state procedures fell below the requirements of due process*, or presumably if state courts would themselves adopt a wider full and fair opportunity limit.

Wright, Miller and Cooper, *Federal Practice and Procedure* §4471 (Supp. 1991) (emphasis added). That commentator provided further elucidation of the so-called "full and fair opportunity to litigate" exception:

> In cases controlled by § 1738, however, [the Court in *Kremer*] concluded that this exception permits federal courts to ignore a state judgment only if the state procedures violated due process.
>
> * * *
>
> Discrimination plaintiffs may seek ways to avoid the preclusion result of the Kremer case, but there are few promising paths to follow. The only clear release occurs if state courts themselves would not recognize preclusion.... It does not seem likely that any of these arguments will succeed often; at least most will not succeed at all.

* * *

> There is obviously room in the Court's opinion to defeat preclusion by showing that the state proceedings did not afford a full and fair opportunity to try the discrimination claim. The test applied to state proceedings, however, is the due process test.... [C]laimants should find little solace in the prospect that they can avoid preclusion by showing a denial of due process in state proceedings.

Id.

Although Kaw Housing Authority perhaps did not need to plead its case as specifically as it did, the complaint itself pleads with clarity that Kaw Housing Authority had the opportunity to litigate the issues it raises in this case in the district court of Kay County, Oklahoma. The complaint likewise demonstrates that the Kay County District Court entered a final judgment which operates to bar this claim in this case. The fact that Kaw Housing Authority made what it now considers to have been a mistake in its litigation tactics does not suffice to

limit the *res judicata* effect of the prior state court judgment. And the wholly unsubstantiated assertion by the court below that there was insufficient evidence to show that Kaw Housing Authority had a full and fair opportunity to litigate its Fair Housing Act claim, without any reference to Oklahoma law or the state court's procedures, is such a departure from the normal practice of all federal courts, as clearly delineated in the opinions of this Court, as to require this Court's supervision in this case.

POINT III:

Requiring a successful litigant to file a cross-appeal from a judgment dismissing all claims is in conflict with applicable decisions of this Court and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Unprecedented is the assertion of the Court of Appeals that the City of Ponca City must have filed a cross-appeal in order to assert that the doctrine of *res*

judicata barred this claim. This court has stated, on numerous occasion, that "the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Dandridge v. Williams*, 397 U.S. 471, 475, n. 5 (1970) (citations omitted). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n. 7 (1984); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-481 (1976). Where a party has absolutely succeeded on the merits in the trial court, as Ponca City did here, *see* Fed. R. Civ. P. 41(b), it is difficult to imagine how, or why, a party should ever cross-appeal.

Should a party who wins always file a cross-appeal? Surely such a requirement would further backlog the courts with unnecessary paper. Should the prevailing

party seek a new trial? Such an absurd result is precisely what the order of the Tenth Circuit would require.

When a party wins on the merits, the case ends. There is no reason to file an appeal to vindicate an alternative argument.

This is not a case where Ponca City is attempting to enlarge its rights beyond those already given it by the trial court. *Cf. Thigpen v. Roberts*, 468 U.S. 27 (1984). Ponca City does not seek, for example, to succeed on the merits of a count it lost. Instead, it is merely seeking affirmance of the district court's dismissal order, albeit on a different basis than the court below adopted. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Any order according *res judicata* effect to the prior state court judgment would conclude precisely as the trial court's judgment did: "Therefore, the motion to dismiss is hereby granted." *See* appendix at pages 56-57.

The Tenth Circuit's concern for "other potential plaintiffs having some relationship" with Kaw Housing Authority is nonsensical. The responsibility of a court is

to deal with the parties and the case before it. This litigation, like the prior state court proceeding, is between this petitioner and this respondent. This is not a case between John Doe and Jane Roe, but between Kaw Housing Authority and Ponca City. In any event, how the Tenth Circuit could possibly know the claims preclusive effect of this case on non-parties is mystifying, since that court never examined Oklahoma law, the controlling law.

The court's decision, whether on the basis of the Civil Rights Acts of 1866 and 1871, the Fair Housing Act or the doctrine of *res judicata*, will bind only the parties before it. Of course, a privy to a litigant may later be found to be bound by the same result. But the privy certainly has the opportunity to litigate for itself both its status as a privy and the preclusive effect of the prior determination. *See Montana v. United States*, 440 U.S. 147 (1979). Other parties who are not privies, in any event, always retain the right to seek to vindicate their own rights.

Ponca City could not have won a more complete

victory. Ponca City moved to dismiss the complaint. The trial court dismissed the complaint. Ponca City objected to a motion to set aside the dismissal. The trial court denied Kaw Housing Authority's motion. A more complete victory was not possible.

The point is this - Ponca City may assert the doctrine of *res judicata* to support the order of dismissal in this case without filing a cross-appeal. As previously stated in this petition, the doctrine of *res judicata* absolutely bars these claims. Ponca City, which obtained a judgment of dismissal, is entitled to defend that judgment without having to appeal or to cross-appeal. The Tenth Circuit's order is such a departure from the normal and customary conduct of judicial proceeding, and is in such conflict with decisions of other federal courts of appeals, that this court should issue a writ of certiorari to the Tenth Circuit in this case.

CONCLUSION

The Tenth Circuit so far departed from the accepted

and usual course of judicial proceedings in several respects as to call for an exercise of this Court's power of supervision. The court openly substituted its own concept of the reach of the Fair Housing Act for the plain words of Congress's enactment. That, in turn, resulted in a serious breach of customary norms of federalism. Similarly, the Tenth Circuit absolutely ignored the plain rulings of this Court in regard to practice under the Federal Full Faith and Credit Act, by paying absolutely no credence to Oklahoma's claims preclusion law. This, too, has had a serious impact on the federal system, by calling into question the finality and viability of state court judgments. Lastly, the Tenth Circuit created a new requirement that a party who is absolutely successful on the merits of the case must nevertheless appeal the trial court's decision in order to preserve an alternative basis for supporting the trial court's decision. Petitioner, City of Ponca City, therefore prays this Court, upon consideration of its argument, to grant it certiorari for review of these important issues, and to allow petitioner to file its brief

and articulate more fully the reasons that the Tenth Circuit's opinion should be reversed.

Respectfully submitted,

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